

Mitigation Measures

Forgiveness Plan For Tier I Violations

- A Forgiveness Can Only Be Used For The Submeasure For Which It Was Granted
- A Forgiveness May Only Be Used To Offset A Basic Failure Consequence (i.e., No Forgiveness For Intermediate, Severe or Chronic Failures)

Caps On Liability

- Absolute Caps Are Never Appropriate
- Procedural Caps Can Be An Interim Safeguard But Should Not Limit Tier I Payments, Which Are Intended To Be A Surrogate For Actual CLEC Injury
 - May Be Appropriate If Total Consequences Exceed \$150 Million In A 12 Month Period (But No Limit On Tier I Payments To Individual CLECs)
 - Amounts Up To The Cap Must Be Paid With Amounts Exceeding The Cap Placed Into Escrow Pending Regulatory Review

Other Important Consequence Provisions

- **Late Performance Reports** - \$5,000 Per Day Late Payable Into a Neutral Fund (As Determined By The Last CLEC Report Delivered For A Period)
- **Incomplete or Revised Data** - \$1,000 Per Day Late, Payable Into a Neutral Fund (Based Upon Original Due Date And Delivery Date Of Revised Data/Report)
- **Late Payment of Applicable Consequences** - Consequence Amount + Per Diem Interest Based On BANY Rate Of Return For Most Recently Reported year
- **Reimbursement of Litigation Expenses** - CLECs Reimbursed For Reasonable Attorneys' Fees In Proportion To Pay Out Of Amount Litigated

Other Issues

- No Aggregation Of Performance Measures Should Be Permitted (e.g., No Weighting and No Indexing)
- No “Exception By Explanation”
 - Understanding Reasons For A Performance Failure (Root Cause Analysis) Is Important But Not a Reason for Waiving Consequences
- Any Exceptions Granted Must:
 - Be Based On Very Clear And Specific Rules That Are Documented In Advance
 - Show Clear “Greater Impact” Upon the ILEC Compared To Any CLEC
 - Be Tracked On An On-Going Basis To Monitor Areas of Performance and CLECs Impacted By Any Exceptions

NY Performance Assurance Plan- An Ineffective Deterrent

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Basic Problems

- Extremely Complex
- Caps Within Caps Severely Limit BANY's Exposure
- Excessive Aggregation Of Measures
- Does Not Balance Type I And Type II Errors At Appropriate Levels
- Results Not Verified At The Outset
- Takes Too Long To Implement And Enforce

Excessive Complexity

- PAP Is So Complex It Is Nearly Impossible To Understand, Track And Administer
- Creates Too Many Opportunities For Differing Interpretations, Gaming By BANY, And Future Disputes
- Payment Mechanism Requires A Separate CLEC Validation Process
- Will Not Be Effectively Self-Administering

Multiple Caps Severely Limit BANY's Exposure

- The Plan's Caps Substantially Dilute The Plan's Deterrent Value
- Annual \$150M Cap Is A Fiction
- Monthly \$12.5M Caps Are Split Too Many Ways To Generate Meaningful Consequences
- Monthly Maxima Cannot Be Reached, Except Through Awful Performance Across The Board -- Reaching The Annual Cap Requires 12 Consecutive and Disastrous Months of Failures

Excessive Aggregation Of Measures

- Weighting And Combining Of Measures Is Detailed But Largely Arbitrary
 - The Market Should Determine Which Measures Are Most Important
- “Mode Of Entry” Scores May Inappropriately Influence CLEC Market Entry Decisions (Due To Weighting And Apportionment Of Caps)

Excessive Aggregation Of Measures

- Too Few “Critical Measures” To Fully Assess BANY’s Performance Failures Or Create An Effective Deterrent
- BANY May Be Averaging Scores Of Individual CLECs In Deriving An Aggregate Performance Level
- Assignment Of Payment Amounts To Individual CLECs Is Too Complex

Scoring Fails To Balance Type I And Type II Error

- Plan Is Based On Only A 5% Type I Error Rate
 - Retroactive Elimination Of -1 Scores Generates 5% Error Rate
- 5% Error Rate Is Too Stringent For Individual CLECs Harmed By BANY's Poor Performance
 - AT&T Plan Appropriately Uses Different Error Rates For Tier I and Tier II

PAP Applies Consequences Inappropriately

- Only Doubles Consequences For Three Consecutive Failures
 - Likelihood Of One Random Failures Is 400 Greater Than Three Consecutive Random Failures (Which Argues For A Consequence That Is 400X)
- PAP Tapers Consequences In Equal Increments
 - Actual Likelihood Of z-Score Changes Is Not Arithmetic

PAP Does Not Provide Immediate Relief

- Unaudited Performance Results
- Unaudited Mechanism For Applying Consequences
- No Audit For 15 Months After 271 Approval
- No remedies Payable At All For 7 Months After 271 Approval (At the Earliest)

PAP Exception Process

- Exception Process Allows BANY To Create Unnecessary Litigation